

No. 42995-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

Respondent

vs.

TIMOTHY ASHE

Appellant

FILED
JUN 10 2014
CLERK OF COURT
JULIA A. BROWN

ON APPEAL FROM THE SUPERIOR COURT FOR SKAMANIA COUNTY
The Honorable Brian Altman
Superior Court No. 10-1-00084-2

APPELLANT'S OPENING BRIEF

MARK W. MUENSTER, WSBA #11228
1010 Esther Street
Vancouver, WA 98660
(360) 694-5085

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. ASSIGNMENTS OF ERROR	1
1. Appellant assigns error to the court's denial of his motion to withdraw his plea of guilty.	1
2. Appellant assigns error to the court's denial of his motion to reconsider the motion to withdraw his plea.	1
II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	1
1. Did the court err in denying the motion to withdraw the plea when the state did not object, and agreed there had been a mutual mistake on the parties' parts?.....	1
III. STATEMENT OF THE CASE	1
IV. ARGUMENT AND AUTHORITY.....	4
A. The trial court erred in denying the motion to withdraw the plea when the plea agreement was the result of a mutual mistake of the parties.	
1. Relevant Court Rules	4
2. Nature of the plea agreement, and remedy for mistakes relating to the agreement.....	4
V. CONCLUSION.....	9

TABLE OF AUTHORITIES

Washington Cases

<i>State v. Barber</i> , 170 Wn. 2d 854, 859, 248 P.3d 494 (2011).....	5
<i>State v. Bisson</i> , 156 Wn.2d 507, 517, 130 P.3d 820 (2006).....	5, 6
<i>State v. Harrison</i> , 148 Wn.2d 550, 556, 61 P.3d 1104 (2003).....	5
<i>State v. Miller</i> , 110 Wn.2d 528, 531, 756 P.2d 122 (1988)	5, 7
<i>State v. Moore</i> , 75 Wn. App. 166, 173, 876 P.2d 959 (1994).....	5, 7
<i>State v. Skiggn</i> , 58 Wn. App. 831, 835, 795 P.2d 169 (1990)	5
<i>State v. Sledge</i> , 133 Wn. 2d 828, 838-40, 947 P.2d 1199 (1997)	5
<i>State v. Tourtellotte</i> , 88 Wn. 2d 579, 583, 564 P.2d 799 (1977).....	5
<i>State v. Walsh</i> , 143 Wn.2d 1, 17 P.3d 591 (2001).....	6
<i>State v. Wilson</i> , 102 Wn. App. 161, 6 P.3d 637 (2000).....	5
<i>Tyrrell v. Farmers Ins. Co. of Wash.</i> , 140 Wn.2d 129, 133, 994 P.2d 833 (2000).....	5

Statutes

RCW 9.94 A.030 (35).....	8
RCW 9.94 A.030 (55).....	8

Rules

CrR 4.2 (f)	4
CrR 7.8.....	4

I. ASSIGNMENTS OF ERROR

1. Appellant assigns error to the court's denial of his motion to withdraw his plea of guilty.
2. Appellant assigns error to the court's denial of his motion to reconsider the motion to withdraw his plea.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the court err in denying the motion to withdraw the plea when the state did not object, and agreed there had been a mutual mistake on the parties' parts?

III. STATEMENT OF THE CASE

In December of 2010, Timothy Ashe was charged by information filed in the Skamania County Superior Court with three counts of assault in the second degree. CP 1-2. Some seven months later, the prosecutor agreed to amend the information to one count of second degree assault, and Mr. Ashe agreed to enter a plea to the one count. CP 3-4 and CP 5-14.

The prosecutor agreed to recommend the bottom of the standard range (90 days) and to recommend that the court impose no additional jail time and convert the standard range sentence to "work crew" for the balance of the sentence, minus the one day Mr. Ashe had previously spent in custody. CP 5-14, and RP 10-11. Defense counsel indicated to the court that it was an agreed recommendation that the remainder of the sentence be served on work crew. RP 12, 15-16.

After hearing background information from Mr. Ashe's lawyer, RP 12-14, and allowing him the opportunity for allocution¹, RP 16, the court commented that "this is a well thought through agreement and I'm going to agree with it.... So it would be 89 days on the work crew." RP 20. The court entered a judgment and sentence which reflected his oral pronouncement. CP 15-27.

Mr. Ashe was deemed by the sheriff to be unable to participate in work crew for medical reasons. RP 25; CP 28-33. His original lawyer filed a motion to withdraw his plea, CP 28-33, and then filed a motion to withdrew as his lawyer. RP 26.

At the hearing on the motion to withdraw the plea², held on December 15, 2011, the prosecutor told the court that Mr. Ashe had been deemed medically unable to perform work crew. RP 25. The prosecutor did not object to the motion to withdraw the plea, based on the mutual mistaken assumption of the parties that Mr. Ashe would be able to serve the sentence on work crew. RP 25-26, 30.

Mr. Ashe also argued that withdrawal of the plea should be allowed on the basis of mutual mistake of the parties. RP 27, 28. He would not have entered into the agreement but for the fact that he believed any sentence would be served on work crew. RP 31. The court opined that

¹ Mr Ashe told the court he "had no intent to do any harm to anyone," and "had no intent to hurt anybody."...And I thought they were gonna [sic] run over me." RP 16-17.

² Since Mr. Ashe's original lawyer had been permitted to withdraw, Mr. Ashe was represented at the hearing on the motion to withdraw the plea by present appellate counsel.

it was not a mutual mistake if the court simply did not follow an agreed recommendation of the parties, but did something else instead. RP 29, 31. The court then asked defense counsel how the withdrawal of the plea would “benefit Mr. Ashe”, and was told that Mr. Ashe wanted to assert his right to have a trial on the allegations. RP 29, 32.

The prosecutor reiterated that he felt the mutual mistake doctrine did apply, because both parties entered into the plea agreement with the belief that work crew would be a realistic option for the service of the sentence. RP 30. But due to the sheriff’s assessment of Mr. Ashe’s medical condition, that became impossible. RP 31.

The court denied the motion to withdraw the plea, and a motion to reconsider made at the same hearing. RP 32-33; CP 35-36. This appeal was timely filed thereafter. CP 37-39.

At the hearing for setting of conditions of release while the appeal was pending, the trial court again questioned counsel about whether asking for the plea to be withdrawn was in Mr. Ashe’s best interests.³ The court reiterated that

It was partly the prosecutor’s promise to the previous lawyer that he (Mr. Ashe) would get community service that causes us to be here today. And the prosecutor has conceded that point on the record a couple of times.

³ THE COURT: [It] would be quite ironic for him to win this motion at the appellate level and start over. He told me last time he wants another—he wants a trial....To have a trial, be convicted, and then go to the penitentiary.

MR. MUENSTER: It would be quite ironic...but he does want his trial and we believe he’ll be found not guilty at trial. RP 46.

They somehow made it apparent to Mr. Ashe between all three of them—the prosecutor, Mr. Krog, and Mr. Ashe,—that community service was going to be the deal. And even though the Judgment and Sentence says something else, Mr. Ashe was certainly under that impression, and in fact, that’s what I gave him. RP 48-49.

IV. ARGUMENT AND AUTHORITY

A. The trial court erred in denying the motion to withdraw the plea when the plea agreement was the result of a mutual mistake of the parties.

1. Relevant Court Rules

The withdrawal of a guilty plea is governed by CrR 4.2 (f), which states as follows:

The court shall allow a defendant to withdraw the defendant’s plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice....If the motion is made after judgment, it shall be governed by CrR 7.8.

CrR 7.8(b) provides in pertinent part as follows:

On motion and upon such terms as are just, the court may relieve a party from a final judgment, order or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect, or irregularity in obtaining a judgment or order;

...

(5) Any other reason justifying relief from the operation of the judgment.

In the present case, the motion to withdraw the plea was made after judgment, so CrR 7.8 becomes the relevant rule.

2. Nature of the plea agreement, and remedy for mistakes relating to the agreement

A plea agreement is a contract, in which the defendant gives up significant constitutional rights, including the right to have a trial, in

exchange for the state's agreement to dismiss counts or to recommend a particular sentence. *State v. Wilson*, 102 Wn. App. 161, 6 P.3d 637 (2000); *State v. Sledge*, 133 Wn. 2d 828, 838-40, 947 P.2d 1199 (1997); *State v. Tourtellotte*, 88 Wn. 2d 579, 583, 564 P.2d 799 (1977). Because a plea agreement is a contract, issues concerning the interpretation of a plea agreement are questions of law reviewed *de novo*. *State v. Bisson*, 156 Wn.2d 507, 517, 130 P.3d 820 (2006); *State v. Harrison*, 148 Wn.2d 550, 556, 61 P.3d 1104 (2003); *Tyrrell v. Farmers Ins. Co. of Wash.*, 140 Wn.2d 129, 133, 994 P.2d 833 (2000).

Washington courts have recognized that where a plea agreement is based upon a mutual mistake of the parties, one remedy available to the defendant is withdrawal of the plea.⁴ *State v. Barber*, 170 Wn. 2d 854, 859, 248 P.3d 494 (2011); *State v. Moore*, 75 Wn. App. 166, 173, 876 P.2d 959 (1994); *State v. Skiggn*, 58 Wn. App. 831, 835, 795 P.2d 169 (1990). In *State v. Wilson, supra*, Wilson entered his guilty plea on the premise that he would be eligible for work ethic camp. However, Wilson was ineligible because one of his prior drug convictions was a delivery, rather than a possession charge. Because the fault for this mistake lay both with Wilson and the state, the court held that in that situation Wilson

⁴ Before *Barber*, our Supreme Court had held, in *State v. Miller*, 110 Wn. 2d 528, 756, P.2d 122 (1988), that when a defendant enters into a plea agreement premised on mutual mistake, the defendant had the choice of remedy between specific enforcement of the plea and withdrawal of the plea. *Barber* overruled *Miller* on this point and held that the remedy is limited to withdrawal of the plea, at least in situations where specific enforcement of the plea would lead to a sentence that is illegal.

could not ask for specific performance as a remedy. However, it did remand to allow him to withdraw his plea of guilty.

In *State v. Skiggn, supra*, defense counsel was primarily responsible for an error regarding the offender score, and the state partially responsible for the error by not detecting it. The court did not allow specific performance based on the mutual mistake, but did allow withdrawal of the plea. *Skiggn*, 58 Wn. App. at 839.

In *State v. Walsh*, 143 Wn.2d 1, 17 P.3d 591 (2001), the defendant agreed to plead guilty, but the parties were mistaken about the standard range that applied. Walsh was sentenced to an exceptional sentence, and was apparently not aware at the time of the sentencing that the standard range calculation had changed. He did not attempt to withdraw his plea at the trial court level, but instead filed an appeal. The Court of Appeals affirmed his conviction and sentence on the theory that he had “waived” the right to withdraw his plea. 143 Wn. 2d at 5. The Supreme Court reversed, and held that Walsh had the right to withdraw his plea based on the mutual mistake of the parties concerning the calculation of the standard range, even though the trial court had not imposed a standard range sentence.

In *State v. Bisson, supra*, the defendant sought to withdraw his pleas of guilty to multiple robberies with deadly weapon enhancements, because he had not been informed that these would run consecutively to

each other and to the sentences on the substantive counts. The state conceded that the plea agreement was at least ambiguous on this point. The Court of Appeals ruled that he could withdraw his pleas but was not entitled to partial rescission of the pleas. 156 Wn. 2d at 509. The Supreme Court held that the plea agreement had been ambiguous with respect to the deadly weapon enhancements, and thus the plea was not voluntary. The court remanded to allow withdrawal of the pleas, but did not allow specific performance, which would have effectively run the sentence enhancements concurrently.

In *State v. Moore*, 75 Wn. App. 166, 876 P.2d 959 (1994), the defendant disclosed to the state a conviction for which he had received a deferred sentence. Both parties believed at the time of the entry of his plea to third degree assault that the deferred sentence would not count as criminal history. At the sentencing hearing, when prompted by DOC, the state took the position that the deferred sentence did count in the offender score, contrary to the position it had taken at the entry of the plea. When confronted with the resulting higher sentence range, Moore moved to withdraw his plea, but the trial court denied the motion on the basis that the disclosed conviction was “additional criminal history” which the plea form stated was not a basis for withdrawal of a plea.

The *Moore* court followed the reasoning of *State v. Miller*, 110 Wn.2d 528, 531, 756 P.2d 122 (1988), and held that Moore had not fully understood the consequences of the plea due to the mistake of the parties

in not recognizing that the deferred sentence did count as criminal history.

The court remanded to allow Moore to withdraw his plea.

The plea agreement in Mr. Ashe's case required the prosecutor to recommend a 90 day sentence, with credit for one day served, and the balance of 89 days converted to work crew. CP 5-14. This would have been a lawful sentence, since "work crew" is a type of "partial confinement", RCW 9.94 A.030 (35) and (55), and a court can convert a total confinement sentence to partial confinement, within the limits established in RCW 9.94A. 680 (sentence of one year or less). It is clear that the parties contemplated a joint recommendation to the court, and one that would not require any additional time in full custody. The trial court obviously felt that this was an appropriate sentence, since it followed the recommendation and called it a "well thought through" agreement. However, the mistake which both parties made was assuming that Mr. Ashe would qualify physically for work crew. As it turned out, the sheriff deemed him medically unable to be on work crew, thus frustrating the expectations of the parties and the court.

This was not a situation where Mr. Ashe had made any misrepresentation to the state or to the court. His first trial lawyer believed that he would be eligible to do work crew⁵, and his entering into the plea agreement was based on that premise, one that was apparently shared by

⁵ "He's been a hard working man who's had a business here, and he continues to work hard, and will take the time to make sure he gives back to this community through the work crew time..." RP 15-16.

the prosecutor. It is thus clear that at the time of entry of the plea, the parties, like the ones in *Wilson*, *Walsh*, and *Moore*, were laboring under a mutual mistake which was *not* the result of deception by the defendant. The mutual mistake about the availability of work crew meant that Mr. Ashe was not adequately informed about the sentencing consequences of his plea, and therefore the plea was involuntary. Under the case authorities cited above, he should have been allowed by the trial court to withdraw his plea when the mistake came to light, which in this case happened to be after sentencing.

The court acknowledged that the state had conceded that the plea had been entered into based on the parties' mutually mistaken assumption that Mr. Ashe would be eligible for work crew. Given that fact, and given there was no indication that the state would have been prejudiced in its case preparation, the court erred in denying the motion to withdraw the plea.

V. CONCLUSION

Mr. Ashe entered into a plea agreement with the state on this assault charge based on the state's promise to recommend the low end of the sentencing range, and to recommend that the court utilize the work crew alternative to total confinement for the balance of the 89 days of the standard sentencing range. Mr. Ashe would not have entered into the plea agreement without that commitment. While the prosecutor did follow through with the recommendation, and the trial court followed the

recommendation, when urged to do so by both parties' lawyers, the sentence turned out to be impossible to serve on the terms ordered by the court because Mr. Ashe was deemed physically incapable of doing work crew by the sheriff who supervised it. The parties were simply mutually mistaken as to the viability of a fundamental part of the plea agreement. Washington law is clear that when a plea agreement is premised upon a mutual mistake, one of the remedies available to the defendant is withdrawal of the guilty plea. This court should reverse the Superior Court and remand with directions to allow the withdrawal of Mr. Ashe's guilty plea.

Dated this 5th day of April, 2012

LAW OFFICE OF MARK W. MUENSTER

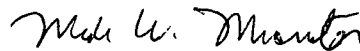


Mark W. Muenster, WSBA 11228
Attorney for Timothy Ashe
1010 Esther Street
Vancouver, WA 98660
(360) 694-5085

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of: Appellant's opening brief, upon the following attorney of record and the Defendant at the addresses shown, by depositing the same in the mail of the United States at Vancouver, Washington, on the 5th day of April with postage fully prepaid.

DATED this 5th day of April, 2012



Mark W. Muenster

Yarden Weidenfeld
Deputy Prosecuting Attorney
PO Box 790
Stevenson, WA 98648

Tim Ashe
PO Box 100
Stevenson, WA 98648